

BEFORE THE COMMISSIONER OF

POLITICAL PRACTICES

In the Matter of the Complaint)
Against CITIZENS FOR COMMON)
SENSE GOVERNMENT; the Campaigns)
of Missoula City Council)
Candidates CAROLYN OVERMAN,)
JAMIE CARPENTER, BOB LUCENO,)
MYRT CHARNEY, JACK REIDY, and)
TRACEY TUREK; and Missoula)
County Commissioner BARBARA)
EVANS.)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Dave Harmon and Craig Sweet, candidates for the Missoula City Council in the 1997 election, filed a complaint against Citizens for Common Sense Government, the campaigns of Missoula City Council candidates Carolyn Overman, Jamie Carpenter, Bob Luceno, Myrt Charney, Jack Reidy, and Tracey Turek, and Missoula County Commissioner Barbara Evans. The complaint alleges the following violations of Montana law:

Claim 1: Citizens for Common Sense Government (CCSG) is not an independent political committee under Montana law, but is rather a principal campaign committee. Since CCSG is a principal campaign committee, it violated Montana Code Annotated § 13-37-216 by accepting contributions in excess of \$100.

Claim 2: CCSG violated Montana Code Annotated § 13-37-201 by failing to register as a political committee within five days after making expenditures.

Claim 3: CCSG violated Montana Code Annotated §§ 13-37-225 and 13-37-226 by not reporting contributions and expenditures in a timely manner.

Claim 4: CCSG violated Montana Code Annotated § 13-35-225 by distributing anonymous campaign literature.

Claim 5: CCSG violated Montana Code Annotated § 13-37-210 by not naming itself in a way that clearly identifies the economic interest of a majority of its contributors.

Claim 6: CCSG violated Montana Code Annotated §§ 13-37-225 and 13-37-226 by not reporting the use of golf carts during a September 27, 1997 parade.

Claim 7: CCSG violated Montana Code Annotated § 13-35-234 by making false statements regarding candidate voting records.

Claim 8: Missoula County Commissioner Barbara Evans violated Montana Code Annotated 13-35-226 by soliciting a public employee to write a letter supporting CCSG.

SUMMARY OF FACTS

1. Six seats on the twelve-member Missoula City Council (Council) were up for election in November, 1997. Prior to the election CCSG, a political committee, publicly stated its endorsement of candidates Carolyn Overman, Jamie Carpenter, Bob Luceno, Myrt Charney, Jack Reidy, and Tracey Turek. Candidates Dave Harmon and Craig Sweet filed a complaint alleging that CCSG

and others violated various Montana statutes governing election campaign practices and finance reporting.

2. In early June, 1997, a group of individuals who were concerned about the 1997 Council election met informally to share their concerns. The group included Bob McCue, Diane Beck, Charlie Brown, Barbara Evans, and others. Prior to the election five of the twelve sitting Council members were aligned with a political organization known as the "New Party." Two incumbent and one New Party backed candidates ran in the 1997 election. The group of individuals who met in early June did not agree with the direction in which they perceived New Party Council members were taking Missoula, and they wished to do something about it. The group held several additional meetings in June and July to discuss how best to proceed, and eventually decided to form a political committee.

3. None of the six Council candidates who were later endorsed by CCSG were present at or knew about the early meetings referred to in paragraph 2, above.

4. There was never a group formally known as "Take Back Missoula," but it was an informal nickname attributed to the group out of which CCSG subsequently arose by some of those who attended meetings in June and July.

5. In mid-July Charlie Brown met with some of the candidates later endorsed by CCSG and gave them some advice on their campaigns. He also arranged for wood to be donated for yard signs

for some of the candidates. The contribution of the lumber was properly reported on those candidates' campaign reports.

6. CCSG formally filed its statement of organization (form C-2) with the Commissioner of Political Practices (Commissioner) on August 14, 1997, registering as a political committee. Diane Beck was designated as the treasurer, and Bob McCue was listed as the chairperson. In the space marked "Name of Candidate(s) or Ballot Issue(s)" CCSG indicated "Multiple Candidates."

7. The Commissioner's office sent Diane Beck a letter dated August 15, 1997, acknowledging receipt of the CCSG's C-2. Included with the letter were reporting forms (C-6), an accounting and reporting manual, a booklet of campaign finance and practice laws, and a quick reference list. The letter also stated:

Your first report will be due in this office by January 31, 1998. The report will cover all activity of your committee through December 31, 1997. We will be sending you a reminder of this report date and also a reporting calendar for 1998 at that same time.

8. During the week of October 19, 1997, the Commissioner's office received several telephone calls from people in Missoula who contended that CCSG was supporting several candidates in the Council election. On October 24, 1997, an employee of the Commissioner's office telephoned Diane Beck and advised her that since CCSG was involved in the city election, under Montana law it was required to file a C-6 on the twelfth day preceding the election. Its first C-6 was due on October 23, 1997, and was

therefore a day late. CCSG faxed a copy of a completed C-6 to the Commissioner's office on October 24, and the original was received on October 27, 1997.

9. Prior to the telephone call from the Commissioner's office, members of CCSG did not review in detail the packet of materials sent by the Commissioner's office, including the accounting and reporting manual and copies of the Montana campaign finance and practice laws. Diane Beck stated that CCSG relied primarily on the statement in the August 15, 1997 letter from the Commissioner's office that CCSG's first report was due January 31, 1998. The statement in the letter from the Commissioner's office was based on what turned out to be the incorrect assumption that CCSG would not be involved in the November, 1997 local elections, but would instead be involved in elections during the 1998 general election year.

10. Typically when the Commissioner's office learns that a C-6 has not been filed by the due date, a telephone call will be placed to the political committee treasurer advising of the requirement. This usually results in the required form being filed, albeit after the due date.

11. In early August, 1997, Barbara Evans and Charlie Brown arranged for the procurement of a booth at the Western Montana Fair in Missoula. Charlie Brown personally paid for the rental of the booth. Their purpose in renting the booth was to provide a means

by which information regarding the Delineated Urban Service Area (DUSA) could be distributed to the public. Evans and Brown invited any candidates who opposed DUSA to make their campaign literature available at the booth. The DUSA proposal was supported by the New Party and its candidates. Some of the Council candidates later endorsed by CCSG used the booth to distribute their campaign brochures. When the booth was rented CCSG did not exist as a political committee, and therefore the committee had no involvement in the procurement of the booth.

12. On September 8, 1997, the day before the primary election, the Missoulian ran a full page campaign ad consisting of four separate ads for candidates Tracey Turek, Carolyn Overman, Roz Chaitoff, and Steve Larsen. Larsen and Turek were opposing candidates in Ward 6, and Chaitoff and Overman were opposing candidates in Ward 1. The ads ran under a heading at the top of the page that stated: "Common Sense Candidates for Missoula." Each of the four candidates paid for one-fourth of the cost of the ad. Barbara Evans came up with the idea for the combination ads, and obtained the approval of each of the candidates. She stated that she did so on her own, and not on behalf of CCSG. Evans also came up with the idea for the "common sense candidates" heading for the ads.

13. Evans and Brown arranged for the procurement of golf carts for candidates to ride in during the University of Montana

Homecoming Parade on September 27, 1997. The golf carts were provided by John Galliher, the golf pro at the Linda Vista Golf Course. Evans paid the \$10 fee for the parade spot out of her own pocket. Candidates Carpenter, Overman, Charney, Turek, and Luceno participated in the parade, and each candidate paid \$13 (\$8 rental fee and \$5 delivery fee) for the golf carts used by them. Those candidates have reported the \$13 as an in-kind contribution on their closing C-5 forms (reports of contributions and expenditures) filed with the Commissioner. CCSG had no involvement in the procurement of the parade spot or the golf carts.

14. CCSG held a fund raiser on October 9, 1997 at Linda Vista Golf Course. None of the six candidates endorsed by CCSG were contacted or invited to attend the fund raiser, and none of them attended. Prior to the event Bob McCue mailed post cards advertising the fund raiser to various individuals and businesses. Following that mailing McCue faxed a document containing more detailed information concerning CCSG and the purpose of the fund raiser to individuals and businesses. The faxed document stated that the purpose of the fund raiser was "to mount a media campaign to let Missoula voters know exactly who the NEW PARTY is and why they should be voting against them and voting for Citizens for Common Sense Government candidates [emphasis in original]."

15. Attached to the complaint filed by Harmon and Sweet is a copy of the October 9 fund raiser document that does not include

information regarding who paid for the document. Bob McCue produced the original document that he had faxed, which still had the carbon stain on the bottom from being faxed so many time. The original document produced by McCue states: "Paid for by Citizens for Common Sense Government." The document does not include the name and address of CCSG's treasurer.

16. The complaint alleges that several documents distributed at the October 9 fundraiser also do not state who paid for the documents. Those documents, however, do not expressly advocate the success or defeat of candidates. The copies submitted with the complaint do not reveal who paid for the communications.

17. All of the accused candidates were interviewed for this investigation. Summaries of those interviews follow. Additional facts obtained from these witnesses are included in other portions of this decision.

Jack Reidy

Jack Reidy was an incumbent who decided early on to run again. He had no campaign slogan, no brochures, no yard signs, and collected less than \$500. Although CCSG endorsed him, Reidy didn't know about the endorsement prior to its appearance in the newspaper. Reidy emphatically denied any coordination between his campaign and CCSG.

Jamie Carpenter

Jamie Carpenter was approached by Barbara Evans, on the last day for filing as a candidate, and asked to run against Council incumbent Linda Tracy. Carpenter and Evans have been friends for some time. Carpenter agreed to run on the condition that Evans would provide her with assistance and advice. This was prior to the formation of CCSG as a political committee, and Carpenter dealt with Evans as a friend, not as a representative of any political committee or organization.

On July 1, 1997, Carpenter attended a meeting organized by Evans and held at the Chamber of Commerce office. Also in attendance at the meeting were Carolyn Overman, Myrt Charney, Tracey Turek, Barbara Evans, Charlie Brown, Diane Beck, and others. The purpose of the meeting was to discuss the upcoming election and to offer assistance to candidates who were new to politics. Carpenter attended several more meetings in July, and received information from Evans and Brown regarding the nuts and bolts of conducting a campaign. Carpenter stated that the assistance she received from Evans and Brown during the early days of her campaign was the result of Carpenter's friendship with Evans.

Once CCSG was formed and registered as a political committee, Carpenter was advised that CCSG could not provide any assistance and she would have to run her campaign on her own. Carpenter did not retain an advertising agency to help with her campaign. She

wrote her own campaign literature. Carpenter stated that she came up with her campaign slogan: "Common Sense." Carpenter stated that there was no coordination or cooperation between her campaign and CCSG. The first time she became aware that CCSG was endorsing her candidacy was October 21, during a radio debate with her opponent, Linda Tracy.

Myrt Charney

Myrt Charney ran unsuccessfully for the Council in 1995. He made his final decision to run in 1997 approximately one week prior to the filing deadline. Charney prepared all of his campaign signs and literature. He did not know anyone associated with CCSG when he filed for office. Charney recalls attending the July 1 meeting held at the Chamber of Commerce office. He stated that he understood the purpose of the meeting was to permit people to meet with him and other candidates. He does not recall anything being said at that meeting regarding organizing or supporting candidates.

Charney attended a second meeting in July, at which Charlie Brown was present. Brown and Charney are friends, and Brown offered to help Charney as a friend. Charney knows Barbara Evans because she lives in his ward. He did not become aware that CCSG was endorsing him until after it appeared in the newspaper.

Charney bought all of his own campaign advertisements. He stated that CCSG never made any contributions or expenditures to or for him or his campaign. Charney devised his "common sense"

campaign slogan. He believes he may have previously used a similar slogan when he ran for office in Alaska. Charney does not recall speaking with any CCSG endorsed candidates regarding the slogan.

Carolyn Overman

Carolyn Overman had been considering running for the Council for some time, and some of her acquaintances encouraged her to run. She has known Barbara Evans for about 12 years. Overman has also known Diane Beck for 10 years. Both Evans and Beck offered advice to Overman, but did not offer to assist with fund raising. Overman did not receive any solicitations from CCSG for permission to endorse her as a candidate, nor did she seek CCSG's endorsement. She did not become aware of CCSG's endorsement of her until it appeared in the newspaper.

Overman is friends with candidates Jamie Carpenter and Bob Luceno, and occasionally discussed campaign strategies with them. Overman stated that with respect to the "common sense" aspect of her campaign literature, this was a "catch phrase" that she had heard over the past couple of years. She recalls discussing the slogan with Carpenter and Luceno, inquiring whether they would be upset if she used the slogan. Overman retained an ad agency to assist with preparing her campaign materials, but she organized and distributed all of her materials. She did not coordinate her campaign with CCSG, Luceno, Carpenter, or any of the other candidates.

Bob Luceno

Bob Luceno decided on his own to run for the Council. While Luceno has known Barbara Evans and Charlie Brown for some time, they did not assist with his campaign. Those who worked on his campaign, aside from Luceno, were his wife, his campaign treasurer, his campaign manager, and his friends.

Luceno became aware of CCSG about a week after they filed as a political committee. He did not know that CCSG planned to endorse his candidacy. Luceno stated that he had no control over what CCSG did, and he did not have any prior knowledge of CCSG's activities during his election campaign.

Tracey Turek

Tracey Turek stated that Barbara Evans contacted her about running for the Council just prior to the filing deadline in June, 1997. Evans and Charlie Brown offered to help Turek with her campaign. Turek stated she received no offers of assistance, contributions, or request for permission to endorse her from CCSG.

Turek stated that the "common sense" slogan used in her campaign was suggested to her by Charlie Brown. However, Turek never discussed the slogan with any of the other CCSG endorsed candidates, nor did she or her campaign collaborate with CCSG or any other candidate regarding the slogan or the "common sense" theme.

18. Key members of CCSG were also interviewed. Summaries of those interviews follow. Additional facts obtained from these witnesses are included in other portions of this decision.

Barbara Evans

Barbara Evans stated that she helped to recruit several of the candidates who were later endorsed by CCSG. She made an offer to Jamie Carpenter, and perhaps other CCSG members, to help with fund raising and other aspects of the campaigns. She stated she knew a broad base of potential contributors. Evans insisted that she did not know that any political committee would be formed at the time she was involved in recruiting candidates and offered them her support. Evans stated that her purpose in supporting the candidates, and in later joining CCSG, was to defeat the New Party. She stated, however, that none of the candidates ever attended a CCSG meeting, nor were any of them invited to CCSG meetings or advised of any of CCSG's activities.

Charlie Brown

Charlie Brown is a friend of Barbara Evans. He stated the initial meetings with candidates were intended to be informative for the candidates, with presentations from various interest groups. In the middle part of July, 1997, Brown met with some of the candidates. Brown recommended Gateway Printing for design and layout of campaign brochures, and Marc Hefty as a photographer.

Brown stated the purpose of organizing CCSG was to expose some of the decisions of the Council with which the members of CCSG disagreed. On August 5 he contacted the Commissioner's office and inquired about the procedure for forming a political committee. The Commissioner's office mailed copies of the Administrative Rules and the statutes, as well a C-2 form, and CCSG subsequently formally organized as a political committee. The members of CCSG elected Bob McCue as president, or chairman, and Diane Beck as treasurer.

Brown insisted that CCSG's activities were not coordinated with the candidates or their campaigns. Any involvement that Brown had with the candidates was entirely independent of CCSG. There was absolutely no solicitation, expenditures, or contributions between the candidates and CCSG.

Bob McCue

Bob McCue stated that CCSG was organized because the parties involved (McCue, Brown, Evans, Beck, and others) saw a need to get involved with the Missoula election. He stated the purpose of forming CCSG was to oppose the political ideology of the New Party, not to support or oppose any specific candidate. McCue stated that he was not involved with any of the CCSG endorsed candidates' campaign slogans, advertising, brochures, yard signs, or any other aspect of their campaigns.

Diane Beck

While she had discussions with others regarding getting candidates to run for election early in the summer of 1997, Diane Beck stated that she was not directly involved with recruiting any of the candidates. She stated that the purpose of organizing CCSG was so that it could run its own political ads opposing the New Party ideology and tactics.

19. Prior to the election CCSG ran radio, television, and newspaper ads concerning actions purportedly taken by the Council with respect to a proposal to develop a store known as Eagle Hardware on Reserve Street. The ads stated that the Council required Eagle Hardware to install racks for 146 bicycles in front of the proposed store, and that the Council had imposed 27 "unprecedented" requirements on Eagle Hardware. These claims were not accurate. In fact, the condition regarding bicycle parking only required installation of 22 bike racks for 43 bikes in front of the store, as well as seven spaces for employees near the store's employee entrance. Moreover, only two of the requirements for the Eagle Hardware project were unique to that project. The other 25 were either standard conditions imposed on similar rezonings, or there was precedent for the requirements in the city or county. And, the two conditions that were unique to the Eagle Hardware project had not even been voted on by the Council, since the developer requested that Council action be delayed until 1998.

20. Cynthia Klette, Director of the Missoula Office of Planning & Grants, a Missoula County entity, became aware of the claims in the ads. She telephoned Bob McCue on the evening of October 28. She then followed up with a letter to McCue on October 29. The letter, on Klette's office letterhead, pointed out the inaccuracies in the ads (as described above) and suggested that McCue either correct the ads or pull them.

21. Klette stated that prior to sending the letter she submitted it to Missoula City Attorney Jim Nugent, who gave his approval. She also distributed copies to members of the Planning Policy Committee, which is the committee responsible for supervision of Klette. Barbara Evans is one of the Committee members. When Evans reviewed a copy of the letter, she became upset because she did not feel it was appropriate. Evans ran into Klette in the rotunda of the Courthouse on the same day that Klette had sent the letter (October 29). Evans extended an offer to Klette to accompany her to Spiker Communications (CCSG's ad agency) to correct the inaccuracies in the ads.

22. Klette accepted the invitation and met at Spiker Communications with Evans, McCue, and three Spiker employees. Klette was advised at the beginning of that meeting that the ads had already been pulled. Klette was also given an opportunity to comment on the ad content, and was assured that the ads would be corrected.

23. Klette stated that following that meeting she decided to write a second letter to McCue. The second letter commended McCue and CCSG for the "serious manner" in which they had responded to the concerns expressed in Klette's first letter. The second letter concluded with the following language:

Immediately pulling the ads in question and meeting to correct inaccuracies show high regard for truth and integrity--values I know you hold deeply. Again, thank-you.

Klette stated that the second letter was not solicited by McCue, Barbara Evans, or anyone else, and the decision to write it was Klette's alone. Klette insists that the letter was not intended for political purposes. Evans also stated that Klette made the decision to write the second letter, and Evans did not intimidate or threaten Klette. Bob McCue recalls asking Klette to write another letter indicating that the inaccurate information had been corrected, so that he could show the public that CCSG was not deliberately providing inaccurate information. Klette, however, maintains that she made the decision to write the letter, and was not influenced by anyone in deciding to do so.

24. After Klette wrote the second letter, Barbara Evans approached her and asked for a copy. Klette, recognizing that the letter was a public document, gave Evans a copy of the letter. On November 3, 1997, the Missoulian ran an ad purchased by CCSG, which reproduced the second Klette letter under the banner: "The Whole Story." On the same date, a deputy Missoula County Attorney wrote

a Memorandum to Fern Hart, Chairperson of the Missoula County Commission. The Memorandum concluded that since the second Klette letter "does not advocate for any particular position or candidate and does not appear to have been written with the purpose of persuading or affecting a political decision," it did not fall "within the prohibition on using public time or resources to persuade or affect a political decision."

25. Prior to the election CCSG ran radio, television, and newspaper ads regarding a proposed subdivision known as Mansion Heights. The ads stated that the Missoula City Council had denied approval of a new proposal by the developer that would have resulted in lower density housing, thereby endorsing the developer's previous plan, which called for more homes (160) higher up on the hill. This claim was somewhat inaccurate. In fact, the Council had previously approved 160 lots for the development. Later, the Council approved a redesign that resulted in 116 lots. On October 28, 1997, candidate Craig Sweet wrote a letter to Bob McCue stating that the claims in the ad were inaccurate, and threatening to file a complaint with the Commissioner if further ads were aired. CCSG apparently did not pull or correct these ads.

26. CCSG produced a newspaper ad that ran in the November 2, 1997 Missoulian. The ad claimed that 23 percent of the City Council's transportation budget was allocated to bike and pedestrian projects, which only 4 percent of the population uses.

As later pointed out by Mayor Mike Kadas, this claim was inaccurate. The budget attributed to the "City Council" was actually controlled by the Transportation Planning Policy Committee, which is composed of county, city, state, and transit district representatives. Moreover, the draft Urban Area Comprehensive Plan, which the ad cited as a reference, states that four percent of the workforce commutes using bicycles, and 5.5 percent of the workforce commutes by walking. Thus, the ad's claim that 4 percent of the population uses bicycle/pedestrian systems was inaccurate. CCSG apparently did not pull or correct this ad.

27. Bob McCue stated he obtained the information for the Eagle Hardware and Mansion Heights ads from an incumbent Council member, and possibly from Charlie Brown's review of a report submitted to the planning commission. McCue admitted that in retrospect it appeared some of the information in the ads was erroneous, but he stated that any inaccuracies were not intentional.

28. As part of this investigation all of the files of CCSG were thoroughly reviewed. That review disclosed no notes, memoranda, records of telephone conversations, correspondence, or other documents or evidence of any kind that would support a conclusion that there was any coordination, cooperation, or consultation between CCSG and the six CCSG endorsed candidates or their campaign organizations.

29. In addition, all of the files of all CCSG endorsed candidates were reviewed. That review likewise disclosed no evidence of any coordination, cooperation, or consultation between CCSG and the candidates or their campaign organizations.

30. Barbara Evans and Charlie Brown were not paid a salary and did not receive any compensation of any kind for their activities undertaken on behalf of CCSG. Nothing that Evans or Brown did on their own, and in particular their activities described in fact summaries 5, 11, 12, and 13, are reflected in any of the records maintained by CCSG.

31. CCSG's amended C-6 form filed by fax with the Commissioner on October 27, 1997 lists 40 contributors. Contributor occupations listed are business owner (15), consultant (4), retired (4), manager (3), Realtor (3), builder (2), developer (1), developer's wife (1), rancher (1), doctor (1), attorney (1), attorney's wife (1), road contractor (1), appraiser (1), and salesperson (1).

STATEMENT OF FINDINGS

Claim 1

The complaint alleges that CCSG is not an independent political committee under Montana law, but is rather a principal campaign committee. If CCSG is a principal campaign committee it is limited to accepting contributions of \$100 from individuals or political committees, pursuant to Montana Code Annotated § 13-37-

216. If CCSG is an independent political committee, there are no limits on how much can be contributed to the committee. Montana Code Annotated 13-37-216(2)(a) provides:

A political committee that is not independent of the candidate is considered to be organized on the candidate's behalf. For the purpose of this section, an independent committee means a committee which is not specifically organized on behalf of a particular candidate or which is not controlled either directly or indirectly by a candidate or candidate's committee and which does not act jointly with a candidate or candidate's committee in conjunction with the making of expenditures or accepting contributions.

Montana Code Annotated § 13-37-226, which establishes reporting schedules for political committees and candidates, contains a similar, though less detailed, definition of "independent committee":

(5) For the purposes of this subsection, a committee that is not specifically organized to support or oppose a particular candidate or ballot issue and that receives contributions and makes expenditures in conjunction with an election is an independent committee.

The Commissioner's administrative rule defining "independent committee" does so in language that is quite similar to the definition in Montana Code Annotated § 13-37-226(5). See Montana Administrative Rule 44.10.327(2)(b). The Commissioner's rule defining "expenditure" establishes strict criteria for an independent expenditure:

"Independent expenditure" means an expenditure for communications advocating the success or defeat of a candidate which is not made with the cooperation or prior consent of or in consultation with, or at the request or

suggestion of, a candidate or an agent of a candidate or committee.

Montana Administrative Rule 44.10.323(3).

Thus, independent expenditures are not coordinated with or made in consultation with a candidate. Such expenditures enjoy considerable constitutional protection because they are, in theory, far removed from the legitimate goal of preventing election corruption. Buckley v. Valeo, 424 U.S. 1, 19-23, 78-81 (1976). In contrast, restrictions on contributions to candidates impose "only a marginal restriction upon the contributor's ability to engage in free communication," Buckley, 424 U.S. at 20-21, because such limits leave persons free to "engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited though nonetheless substantial extent in supporting candidates and committees with financial resources." Buckley, 424 U.S. at 28.

CCSG is an independent political committee. There is no evidence that it was organized on behalf of any particular candidate or candidates. There is no evidence that CCSG was controlled, either directly or indirectly, by a candidate or a candidate's political committee. CCSG did not act jointly with a candidate or a candidate's political committee in conjunction with the making of expenditures or the acceptance of contributions. None of the expenditures made by CCSG were made with the

cooperation or prior consent of, or in consultation with, or at the request or suggestion of a candidate or an agent of a candidate.

CCSG filed its statement of organization on August 14, 1997. CCSG members Barbara Evans and Charlie Brown provided assistance and advice to some of the CCSG endorsed candidates, both before and after CCSG registered as a political committee. While it would have been more circumspect for them to avoid any involvement with those candidates after CCSG was formed, there is no evidence that their activities were undertaken on behalf of or with the prior knowledge or approval of CCSG. The evidence supports a finding that Evans and Brown engaged in those activities independent of and without the prior knowledge or approval of CCSG. See Colorado Republican Federal Campaign Committee v. Federal Election Commission, 116 S. Ct. 2309, 2315, 2317-19 (1996) (finding that disputed expenditures were "independent" and not "coordinated" where there was no factual evidence of coordination).

The campaign literature of Charney, Luceno, Turek, Overman, and Carpenter contains the phrase "common sense," but this is not an unusual political campaign theme. There is no evidence that these candidates conspired among themselves or with CCSG to adopt this phrase as a campaign theme. The complainants also contend that campaign literature and yard signs used by the candidates have a "similar design and layout." However, photocopies of campaign pamphlets and yard signs disclose little, if any, similarity.

Claim 2

The complaint alleges that CCSG failed to register as a political committee within the time required by law. Montana Code Annotated § 13-37-201 requires a political committee to file its C-2 form "within 5 days after it makes an expenditure or authorizes another person to make an expenditure on its behalf." CCSG filed its C-2 on August 14, 1997, and later filed its C-6 listing its first expenditure as occurring on September 3, 1997. The complainants contend that CCSG paid for a booth at the Western Montana Fair, which opened on August 4, 1997, and therefore made an expenditure prior to registering as a committee. The investigation, however, revealed that Barbara Evans and Charlie Brown arranged for procurement of the booth, and Brown paid for the booth. There is no evidence that CCSG (which did not even exist as a committee at the time) was in any way involved in the procurement or rental of the fair booth. There is no other evidence that the committee known as CCSG made any expenditures prior to its first listed expenditure on September 3, 1997.

Claim 3

The complaint alleges that CCSG failed to report contributions and expenditures in a timely manner. Montana Code Annotated § 13-37-225 requires each political committee to file periodic reports of contributions and expenditures made by or on behalf of the committee. Montana Code Annotated § 13-37-226(5) requires

independent political committees to file their initial report on the 12th day preceding the date of an election in which it participates by making an expenditure.

CCSG's initial report was due on October 23, 1997, 12 days before the November 4 election. According to Diane Beck, the report was not filed on that date because, based on a letter from the Commissioner's office, she believed CCSG's first report would be due January 31, 1998. Upon being advised by the Commissioner's office that the report was late, CCSG promptly filed its report on October 24, 1997.

CCSG failed to file its initial report within the time period established by law. Pursuant to Montana Code Annotated § 13-37-121, the Commissioner's office notified CCSG of its noncompliance and CCSG filed the report. Had CCSG failed to file its report after notification by the Commissioner, the Commissioner could have issued an Order of Noncompliance under Montana Code Annotated § 13-37-121. Alternatively, an action seeking a civil penalty could have been filed pursuant to Montana Code Annotated § 13-37-128. The Commissioner expects that reports will be filed when they are due. However, since CCSG promptly complied after notification, no additional action will be taken.

Claim 4

The complaint alleges that CCSG distributed anonymous literature advertising an October 9, 1997 fundraiser, in violation

of Montana Code Annotated § 13-35-225. That statute requires all paid communications advocating the success or defeat of a candidate to state the name and address of the person who paid for the communication. If made by a political committee, the disclaimer must include the name and address of the committee's treasurer.

The document advertising the October 9 fundraiser stated that the purpose of the fundraiser was to raise funds to mount a media campaign to show Missoula voters why they should vote against New Party candidates and for CCSG candidates. It does not expressly advocate the success or defeat of any specific candidates, but rather advertises a fundraiser at which funds will be raised for that purpose. The document stated it was paid for by CCSG, but it did not include the name and address of the committee's treasurer. Additional documents allegedly distributed at the October 9 fundraiser also did not expressly advocate the success or defeat of any specific candidates. Those documents do not contain any information regarding who paid for them.

The penalty for violation of Montana Code Annotated § 13-35-225 is set forth in Montana Code Annotated § 13-37-128:

(2) A person who makes or receives a contribution or expenditure in violation of 13-35-225, . . . is liable in a civil action . . . for an amount up to \$500 or three times the amount of the unlawful contribution or expenditure, whichever is greater.

Montana Code Annotated § 13-35-225 is therefore a penal statute. The test in determining whether or not a statute is penal in nature

is "whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. . . ." Huntington v. Attrill, 146 U.S. 657 (1892); Department of Livestock v. Sand Hills Beef, Inc., 196 Mont. 77, 83, 639 P.2d 480, 483 (1981). Here, the statutes clearly establish a penalty to redress a wrong to the public, not to any specific individual.

Penal statutes, whether civil or criminal, must be strictly construed. Sand Hills Beef, Inc., 196 Mont. at 83, 639 P.2d at 483; State v. Nagle, 100 Mont. 86, 90, 45 P.2d 1041, 1042 (1935). Courts will not apply penal statutes to cases that are not within the obvious meaning of the language employed by the Legislature, even though they may be within the mischief intended to be remedied. State v. Aetna Banking & Trust Co., 34 Mont. 379, 382, 87 P. 268, 269 (1906). See also State ex rel. Penhale v. State Highway Patrol, 133 Mont. 162, 165, 321 P.2d 612, 613-614 (1958).

Applying these rules of construction to the facts of this case, there was not a clear violation of Montana Code Annotated § 13-35-225. While the document advertising the October 9 fundraiser speaks of future plans to mount a media campaign to oppose New Party candidates and support "CCSG candidates," it does not include language that expressly advocates the success or defeat of any specific candidates. Absent such clear and unambiguous language, and applying the rules of strict construction set forth above, there was no clear violation of the statute. Moreover, the

other documents complained about also do not contain express advocacy language that would bring them within the restrictions of the statute.

Further, even if the documents were the type of communications that are subject to the requirements of the statute, it is doubtful whether Montana Code Annotated § 13-35-225 is enforceable. In McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), the United States Supreme Court held that an Ohio ordinance prohibiting the distribution of anonymous campaign literature abridges freedom of speech in violation of the First Amendment.

Claim 5

The complaint alleges that CCSG violated Montana Code Annotated § 13-37-210 by failing to name itself using a name or phrase that clearly identifies the economic or other special interest of a majority of its contributors. There are two important points to bear in mind when considering this issue. First, the statute refers to a majority of **contributors**, not a majority of **contributions**. There were 40 contributors listed on CCSG's C-6. Second, to establish a violation of the statute it would be necessary to prove that CCSG's name does not identify the economic or special interest, "if identifiable," of a majority of its contributors. CCSG's C-6 listing the various contributors to the committee has been carefully reviewed with the objective of identifying those who may have an identifiable common economic or

special interest. No economic or special interest shared by a majority of contributors is readily identifiable. The name chosen for CCSG is not illegal.

Claim 6

The complaint alleges that CCSG violated Montana Code Annotated §§ 13-37-225 and 13-37-226 by failing to include on its C-6 the use of golf carts by CCSG endorsed candidates in the September 27, 1997 University of Montana Homecoming Parade. Since the investigation revealed that CCSG had no involvement in the procurement of the golf carts, it did not violate the statute.

Claim 7

The complaint alleges that CCSG made false statements regarding candidate voting records, in violation of Montana Code Annotated § 13-35-234. That statute makes it unlawful for any person to knowingly misrepresent the voting record or position on public issues of any candidate. The campaign ads that are the subject of this complaint are critical of the actions and votes of the Missoula City Council. None of the ads single out any particular Council candidate's voting record. Thus, the ads, while they may contain inaccurate information, do not violate Montana Code Annotated § 13-35-234. See Matter of Brelsford, Summary of Facts and Statement of Findings (December, 1992).

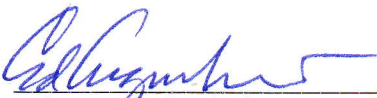
Claim 8

The complaint alleges that Missoula County Commissioner Barbara Evans violated Montana Code Annotated § 13-35-226 by soliciting a public employee to write a letter supporting CCSG. Subsection (2) of that statute states that a person "may not attempt to coerce, command, or require a public employee to support or oppose any political committee." Subsection (3) states that a public employee may not solicit support for or opposition to a political committee "while on the job or at the place of employment." A careful review of the facts brought out in the investigation of this matter discloses that there was no violation of the statute. There is no evidence that Barbara Evans coerced, commanded, or required Cynthia Klette to write a letter praising CCSG's actions. The evidence establishes that Klette decided to do so on her own. Further, while the second letter was written by Klette while on the job, there is no evidence that the letter was an attempt to solicit support for CCSG.

CONCLUSION

Based on the facts and findings herein, I have determined that there is no basis for further action against CCSG, the candidates and their campaign committees, or Barbara Evans.

Dated this 31st day of December, 1997.



Ed Argenbright, Ed.D.
Commissioner of Political Practices